

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CITY OF SOUTH BEND,
Plaintiff,
vs.
SOUTH BEND COMMON COUNCIL,
ET AL.,
Defendants.
BRIAN YOUNG, SANDY YOUNG,
TIMOTHY CORBETT, DAVID WELLS,
and STEVE RICHMOND,
Plaintiffs,
vs.
THE CITY OF SOUTH BEND, Acting
Through its Police Department,
DARRYL BOYKINS, Individually
and in his Official Capacity as
Chief of Police, KAREN DEPAEPE,
and SCOTT DUERRING,
Defendants.

The deposition of: THOMAS FAUTZ.
DATE: Tuesday, April 16, 2013.
TIME: 4:36 p.m. EST.
PLACE: May, Oberfell and Lorber
4100 Edison Lakes Parkway
Mishawaka, Indiana 46545

Called as a witness by the defendants, Scott
Duerring and Karen Depaepe, pursuant to notice of deposition
as to date, place and time, and in accordance with the
Indiana Rules of Civil Procedure, and as reported by
MICHELLE A. WHITAKER, Notary Public, RPR, Associate
Reporter.

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18 ALSO PRESENT:

19 Scott Duerring
20 Darryl Boykins
21 Brian Young

22 THOMAS FAUTZ DEPOSITION EXHIBITS:

- 23 2 - Sworn statement of Thomas Fautz
24 4 - Office of professional standards, seven-page document
25 (Exhibits Two and Four marked in a previous deposition and
utilized herein.)
6 - Position description
---000---

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COPY

1 Tuesday, April 16, 2013 --
2 (All parties present in the conference room
3 at or about 4:36 p.m. Witness sworn.)

4 THOMAS FAUTZ

5 Having been first duly sworn, then testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MS. DUERRING:

9 Q. Can you go ahead and state your name.

10 A. Thomas Fautz. F as in Frank, a-u-t-z as in zebra.

11 Q. How do you prefer I refer to you today?

12 A. "Tom" is fine.

13 Q. Okay. Tom, have you ever been deposed before?

14 A. Yes.

15 Q. Just a couple ground rules before we get started.

16 Obviously, you need to answer out loud for purposes of the
17 court reporter. Try to avoid nodding the head or shaking
18 the head or um-hums or huh-ums, 'cause they don't go down
19 very clearly on the record. And I'll try to remind you if
20 you have that tendency.

21 If I ask a question that you don't understand,
22 please indicate that to me so I can rephrase it or repeat
23 it. Otherwise, I'm going to assume that you understood the
24 question that I asked and your response reflects that
25 understanding.

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1 recorded?

2 A. Yes.

3 Q. And how did that happen?

4 A. Can't say specifically. It was either through the
5 division chief Kilgore or through Karen. I really can't say
6 specifically.

7 **Q. Thinking about this time period right at the**
8 **beginning of your time as chief of police, what lines were**
9 **recorded at that time?**

10 A. It's my understanding, but I had no firsthand

1.1 knowledge, that at that time, the front desk, the radio
1.2 room, the detective bureau chief's office -- not office, but
1.3 the secretary, I should say, the chief of police's

14 secretary.

15 Let me think here. I believe -- I believe that
16 was it.

1.7 I think there was a phone in the -- what would be
1.8 called the uniform supervisor's office, that the line rolled
1.9 over to that -- from the front desk. Those phones weren't
2.0 being asked.

21 I think that's it, as far as I can remember.

22 Q. Were you familiar with the mechanics of that
23 system?

24 A. I knew that the old system prior to me becoming
25 chief -- and I'm not sure when it changed over -- was

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1 reel-to-reel. Like I say, being involved in investigations,
2 at times you would -- you would seek evidence, especially in
3 homicide. And at some point, it changed to digital. When
4 that happened, I can't say for sure.

5 **Q. When the change was made to digital, did you have**
6 **a specific understanding of how that system worked to**
7 **actually capture phone calls?**

8 A. I knew it was -- it was a lot easier for Karen to
9 obtain specific times. And I think the retention of tapes
0 was longer. But as far as getting into the mechanics of it,
1 no, I was never briefed or was involved in that.

2 **Q. During the entire time that you were chief of**
3 **police, was Karen the individual that administered that**
4 **system?**

5 A. Yes.

6 Q. Did she also have the responsibility for
7 maintaining that system?

8 A. Yes.

9 Q. Now, if changes were to be made to the system, did
0 that have to be approved by you?

1 A. I would say either myself or one of the division
2 chiefs. Services chief specifically. There was no specific
3 protocol, so to speak.

4 Q. And let me be a little bit more specific. When I
5 say "changes," I mean in the sense of adding any additional

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1 lines or subtracting lines that were recorded lines under
 2 the system.

3 A. Again, it would have to be done through Karen.
 4 However, there was no specifics on that the chief had to do
 5 it or that the division chief in services who oversaw that
 6 division was in charge of that. But I would expect that it
 7 would be something that the chief would have the major
 8 say-so on approving or authorizing.

9 Q. And when you say "chief," you mean chief of
 10 police --

11 A. Yes.

12 Q. -- and not just a division chief?

13 A. Yes.

14 Q. Were you familiar with the mechanics of how a line
 15 was actually recorded?

16 A. No.

17 Q. Now, you had testified that when you first became
 18 chief, that you were aware that certain lines were being
 19 recorded. Were you aware of the rationale behind why those
 20 lines were recorded?

21 A. The rationale simply would be to record
 22 conversations from the public calling in to, say, 911,
 23 reporting of a crime that could potentially become evidence
 24 at some point. The front desk, same thing. Some people
 25 call that number instead of the 911 system, for police

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1 assistance. And it's used to document -- document calls as
 2 an investigative tool and documentation.

3 Q. Did there ever come a point in time that you
 4 authorized additional lines to be added to the recording
 5 system itself?

6 A. Yes.

7 Q. And can you tell me specifically what lines were
 8 added.

9 A. It was -- and again, this is about eight years
 10 ago. So, it was I would say sometime in late 2004,
 11 mid-2004, in that time frame. As we were transitioning
 12 from -- the police department was going through a remodel
 13 process, and we were transitioning into the remodeled
 14 section to where there was better office space. Internal
 15 affairs had their own suite of rooms. There were some
 16 changes made in that way.

17 And at that time, we were under a lot of scrutiny
 18 by the public, being accused, especially being attacked, on
 19 how we handled complaints and that we did not adequately
 20 document complaints or respond to them. So, we wanted --
 21 there was open discussion amongst the command staff on, you
 22 know, how do we improve on this and how do we protect
 23 ourselves. Because we really felt like we were doing an
 24 adequate job in handling complaints.

25 In fact had -- had extended to -- as an example,

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1 some people were claiming that they didn't want to come down
 2 to the police station, they felt intimidated. So, we --
 3 through the park department, human rights commission, we
 4 obtained space over there on a bus line, handicap
 5 accessible, allowing people to go there for complaints. So,
 6 we really felt -- we added IA pro to track individual
 7 officers. We were trying to do everything we could to be as
 8 transparent with the public yet document what we were doing.

9 At that time, Chief Eugene Kyle, who was the
 10 detective chief, had requested that his line be taped.
 11 Based on that conversation, it opened the door of what other
 12 lines do we want to tape. Decided that my line would be
 13 taped, Chief Kyle's line would be taped, and that Jim
 14 Hassag, who was the uniform chief at the time, that his line
 15 would be taped, all with everybody's knowledge.

16 And Chief Kyle's specific request, he asked that
 17 it be taped. The rest of us said, "Well, yeah, that's the
 18 way to document." It would be a useful tool for that
 19 individual person whose office it was at to use to be able
 20 to document conversations and anyone that called in, to show
 21 that we were responsive.

22 At the same time, because internal affairs was
 23 moving into their suite and John -- Lieutenant John Collins
 24 was the investigator for that section, one of the lines in
 25 internal affairs was taped as well. And John Collins was

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1 made aware of that.

2 So, as far as -- as far as I can recollect --
 3 recollect, the only time I requested that any changes be
 4 made that was -- was that one time. And that was to add
 5 those particular lines.

6 Q. Okay. Now, it sounds like you basically were
 7 designating lines that were associated with the officers
 8 that were in positions of authority. Is that fair to say?

9 A. Positions of authority, we didn't -- like the
 10 services chief or the community relations chief, they really
 11 didn't deal with a whole lot of specific complaints about
 12 not investigating properly or internal-affairs-type things
 13 or complaints against officers, so theirs were not included.

14 But Chief Kyle, who was in the investigative
 15 division, and Chief Hassag, who ran the uniform division,
 16 which is usually the most high-profile area, and myself,
 17 those were the ones, you know, that we designated.

18 Q. So, if I understand you correctly, these chiefs
 19 that were in positions that frequently dealt with the
 20 public?

21 A. Correct.

22 Q. And these were the individuals that, I guess for
 23 lack of a better word, would be subjected to potential
 24 complaints?

25 A. Correct. And it provided them with a tool that

3 (Pages 9 to 12)

Page 13

1 they could use, again for their protection and to aid in an
 2 investigation.

3 **Q. Okay. Now, say, for example, if Jim Hassag had**
 4 **left his position as a chief and a new individual was**
 5 **assigned to that position. Would the policy that you**
 6 **implemented with respect to taping that line continue based**
 7 **upon the philosophy that you've articulated for me?**

8 MR. SULLIVAN: Just interpose an objection.
 9 Mischaracterizes.
 10 Go ahead.

11 A. Yes, in a certain way, with a stipulation. The
 12 person coming into that position would be told that that
 13 line was taped.

14 **Q. Uh-huh.**

15 A. And they had the option of continuing to tape it
 16 or discontinuing it. It was their own personal preference.
 17 Again, these were not tools for anybody but them. And if
 18 they felt that that was something that, you know, they
 19 wanted to have, then that was their prerogative.

20 I can say one hundred percent that at no time did
 21 I ever ask to listen to any tapes regarding those -- those
 22 lines.

23 **Q. Would you agree with me that those tools were**
 24 **provided to these officers that we've discussed with the**
 25 **specific idea that they were resources to be used in the**

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1 **course of their employment?**

2 MR. PFEIFER: Objection. Leading.

3 **Q. You can go ahead and answer.**

4 A. They worked there. It's part of their employment.
 5 It was for their -- for their use as a tool.

6 **Q. Now, you indicated that this discussion was**
 7 **initiated by Eugene Kyle. Is that correct?**

8 MR. PFEIFER: I'm gonna object to form. What
 9 discussion are you talking about?

10 MS. DUERRING: The discussion with respect to
 11 the recorded lines.

12 MR. PFEIFER: Okay.

13 MS. DUERRING: Thank you.

14 A. He brought up the subject, and that kind of
 15 started the conversations. These conversations were in open
 16 staff meetings. It wasn't like anybody was trying to
 17 covertly spy on anyone or anything like that. Again, it was
 18 a personal tool for the peoples whose offices were taped.

19 **Q. And you were satisfied, after these discussions**
 20 **and these meetings, that the purposes behind recording these**
 21 **lines were law-enforcement related?**

22 MR. PFEIFER: Objection. Leading.

23 **Q. What did you feel the basis was for recording the**
 24 **lines?**

25 A. For the individual whose person's office who that

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1 was, it was a tool for them to use in the scope of their
 2 employment as -- you know, as a division chief.

3 **Q. It wasn't put there for personal reasons. Is that**
 4 **fair to say?**

5 A. No.

6 **Q. If an individual officer would come to you and**
 7 **request that a line be recorded because of some personal**
 8 **motivation, would you have authorized that?**

9 A. I -- I can't speculate. I'd have to hear
 10 everything involved in the situation and make a decision
 11 based on that.

12 **Q. Suppose an officer had some sort of a personal**
 13 **vendetta and they wanted to record any conversations that**
 14 **occurred on their -- on their phone lines to pursue that.**

15 A. So, somebody was threatening them or something
 16 along those lines?

17 **Q. Not job-related. Personal.**

18 A. I'd probably consult with the city attorney first.

19 **Q. When you made the decision to place these lines on**
 20 **the recording system, who did you go to?**

21 A. Karen Depaepe.

22 **Q. Did you order her to place those lines on the**
 23 **recording system?**

24 A. I asked her to. I explained -- actually, I
 25 explained to Karen what our motivation was behind it and

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1 said that, you know, we're under a lot of scrutiny, we get
 2 calls and everything else, and we want to be able to
 3 document, and here's the lines I would like to add.

4 I told her, "While I'd like this kept discreet, we
 5 don't want to broadcast to everybody that my line's taped or
 6 their lines are taped. The people have been made aware that
 7 their lines are being taped and that these people may at
 8 times ask you, you know, to access these tapes."

9 **Q. I believe you had indicated in your statement that**
 10 **you provided back on October 23rd, 2012, that you believed**
 11 **the capacity of the recording system was a 20-line system?**

12 A. That's -- I -- that sounds right. Am I hundred
 13 percent correct, I don't know. But that's my belief.

14 **Q. Would you be surprised to know that the system**
 15 **actually has the capacity of recording up to 48 channels?**

16 A. I had no -- I mean, that -- that was my belief. I
 17 can remember Karen saying one thing to me. I said, I don't
 18 know how big this system is or whatever, if you can -- if
 19 this can happen to add these lines. She said, "Oh, yeah,
 20 there's plenty more."

21 **Q. Okay. So again, it's fair to say that Karen**
 22 **Depaepe is the individual that has the most intimate**
 23 **knowledge about the capacity of the system and how it**
 24 **operates?**

25 A. Yeah. As far as I know, she's -- she's probably

4 (Pages 13 to 16)

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1 the lead -- leading expert there, and anything you would
2 want done or you requested something for a case, you would
3 have to go through Karen, who has the ability to monitor or
4 make copies of tapes.
5 **Q. Okay. Now, Karen's position was communications**
6 **director while you were there. Is that correct?**
7 A. Yes.
8 **Q. And is it fair to say that you were in Karen's**
9 **direct chain of command?**
10 A. Well, she reported directly to Chief Kilgore, but
11 then I was in charge of the department.
12 THE DUERRING: Pass the witness.
13 CROSS EXAMINATION
14 BY MR. DIXON:
15 **Q. You gave a sworn statement, right, to Mr. Pfeifer,**
16 **at his law firm in October of 2012, right?**
17 A. Yes.
18 **Q. Did you review that in anticipation of this**
19 **deposition?**
20 A. Yes, I did. And I did find one mistake.
21 **Q. I'm not --**
22 A. Oh, okay.
23 **Q. I'll let you go to that, but you'll knock me off**
24 **stride.**
25 A. Sure.

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1 **Q. Do you have it with you now?**
2 A. I have just been handed a copy.
3 **Q. Okay. Turn to page four. Let's look at lines**
4 **nine through eleven. I'll just read it and you can confirm**
5 **if I've read it correctly. Okay? "There was one line in**
6 **that section that belonged to Chief Eugene Kyle, and upon**
7 **his request, that line was, on my authority taped." Right?**
8 **That's what it says?**
9 A. Yes.
10 **Q. Is that the mistake that you're talking about?**
11 A. No.
12 **Q. Okay. So, that's a correct statement? All --**
13 **everything I read there is a correct statement of yours?**
14 A. Chief Kyle requested his line be taped, and it
15 was.
16 **Q. On your authority?**
17 A. Yes.
18 **Q. In other words, you were ultimately the one who**
19 **said yes, that's okay to do?**
20 A. Yes.
21 **Q. And if you would have said no, then it wouldn't**
22 **have been done?**
23 A. No, it wouldn't have.
24 **Q. And if Kyle had come to you and said I want to get**
25 **some dirt on my neighbor who keeps calling in on me for --**

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1 **you know, I sold him a car and it's a lemon, can you tape my**
2 **line, you would have said no?**
3 A. I can't say definitely no. I'd have to hear
4 everything about it, and I would probably consult the city
5 attorney on it.
6 **Q. From my description, would that -- would that**
7 **appear to you -- just in your opinion. I'm not asking you**
8 **to make a legal judgment. But from my description -- and**
9 **I'll repeat it. He says I want my line recorded because I**
10 **sold a car to my neighbor that's a lemon and now he's giving**
11 **me a hard time about it.**
12 A. Well, giving a hard time --
13 MR. PFEIFER: Objection. Asked and answered,
14 first of all. And secondly, I don't even know
15 that there's a question.
16 MR. DIXON: I didn't -- well, I want to
17 finish the question.
18 MR. PFEIFER: Okay.
19 **Q. So, would that appear -- would recording that line**
20 **based just on that information that I gave to you -- would**
21 **that appear to you to be a law enforcement purpose?**
22 A. On what you said right there, if there's no
23 threats, "I'm gonna kill you," those kinds of things, I
24 would probably say no.
25 MR. DIXON: Okay. I don't have any further

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1 questions. Thank you.
2 CROSS EXAMINATION
3 BY MR. PALMER:
4 **Q. Under your command, was the recording system ever**
5 **used to intimidate anyone?**
6 A. Not -- not to my knowledge.
7 **Q. Was that a motivation for implementing the**
8 **recording system?**
9 A. No. It was -- it was to gather evidence and --
10 and serve as a tool for those individuals who had their
11 lines taped to either defend themselves or document what had
12 taken place.
13 **Q. And that would be the same answer if I asked you**
14 **if the motivation was to embarrass or harass anyone?**
15 A. I would not put up with that.
16 **Q. The answer would be the same, that that was not a**
17 **motivation?**
18 A. Yes.
19 **Q. Would you consider the purposes to document**
20 **complaints and to use as a tool to be a legitimate business**
21 **purpose?**
22 A. Yes.
23 **Q. In your opinion or to your knowledge, is the**
24 **recording of lines into a police station something that's**
25 **ordinarily done by other police stations around the country?**

5 (Pages 17 to 20)

1 Department, while you were the chief, to tap all lines used
2 by captains and chiefs in the department?
3 A. No.
4 Q. Did you ever intend to establish that practice?
5 A. No.
6 Q. Was it ever the practice, while you were chief, to
7 randomly tap lines?
8 A. No.
9 Q. Did you ever intend to establish that practice?
10 A. No.
11 Q. Was it ever your practice, while you were chief,
12 to tap any given line at your own discretion?
13 A. No.
14 Q. Did you ever intend to establish that practice?
15 A. No.
16 Q. Was it ever your practice to tap lines without
17 anyone else's knowledge?
18 A. No.
19 Q. Did you ever intend to establish that practice?
20 A. No.
21 Q. Was it ever your practice to use the recordings
22 that came from the tapped lines for purposes of determining
23 the loyalty of your division chiefs?
24 A. No.
25 Q. Did you ever use it for that purpose?

1 A. No.
2 Q. Did you ever intend anyone to use it for that
3 purpose?
4 A. No. It was a tool for the individual person.
5 Q. And that was the practice that you intended to
6 establish?
7 A. Yes.
8 MR. SULLIVAN: I'm gonna approach the court
9 reporter for purposes of marking an exhibit.
10 (Reporter marked Exhibit Number Six.)
11 Q. Chief, the court reporter has given you Exhibit
12 Six, which is a position description. Do you see that?
13 Have you looked through Exhibit Six, Chief?
14 A. I'm looking at it.
15 Q. Sure. Just give me the hi sign when you've
16 completed your review. Just take whatever time you need.
17 A. Yes, sir.
18 Q. You ready to answer questions about Exhibit Six,
19 Chief?
20 A. Yes.
21 Q. You see that it's the position description for the
22 director of communications?
23 A. Yes.
24 Q. And you're familiar with this position description
25 because the director of communications ultimately answered

1 to you as chief. Is that correct?
2 A. Yes.
3 Q. And that was the position held by Karen Depaepe?
4 A. Yes.
5 Q. Is the director of communications a position in
6 the South Bend Police Department filled by a sworn officer?
7 A. No. It's a civilian position.
8 Q. Does the civilian position of director of
9 communications have law enforcement responsibility?
10 A. No.
11 Q. Investigative responsibilities?
12 A. No.
13 Q. Any training as an investigator of criminal -- of
14 crime -- investigations for crime -- Let me start over.
15 Is the director of communications given any
16 training to be an investigative personnel?
17 A. No.
18 Q. So, is the director of communications for the
19 South Bend Police Department responsible for any review of
20 recorded conversations to determine if there was
21 inappropriate or illegal conduct of any officer?
22 A. No. That would be internal affairs.
23 Q. Is the director of communications responsible for
24 reviewing and listening to recorded conversations to
25 determine if there was any inappropriate or illegal conduct

1 of a captain?
2 A. No.
3 Q. Is the director of communications responsible to
4 review and listen to recorded conversations to determine if
5 there was any inappropriate or illegal conduct of a division
6 chief?
7 A. No.
8 Q. Is it the regular -- Does the director of
9 communications for the South Bend Police Department in their
10 regular course of business have any responsibility for
11 reviewing and listening to recorded conversations within the
12 South Bend Police Department to determine any kind of
13 wrongdoing or inappropriate behavior?
14 A. I would say the only place where that would --
15 would apply is there was a complaint and somebody did not,
16 you know, dispatch a 911 call or something along those
17 lines. But that would be initiated with a complaint and a
18 request to have that information pulled.
19 Q. And is there a form that is filled out when that
20 complaint is initiated or that investigation is initiated?
21 A. Internal affairs would -- you know, an intake
22 form. I really can't remember, you know, the forms. But
23 something would be document on a complaint before we would
24 take it to the level of requesting tapes and those types of
25 things.

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1 Q. Is the director of communications responsible to
2 take her cue from internal affairs to locate the recording
3 that's needed in the investigation?

4 A. Yes. It's to locate the recording and to provide
5 a copy for the investigation.

6 Q. Did she have any responsibility of her own
7 initiative to review and search recorded conversations to
8 determine wrongdoing, inappropriate behavior, or illegal
9 behavior, of her own initiative?

10 A. Not that I'm aware of.

11 Q. Okay. And if you were the chief of police and you
12 found out that the director of communications, of her own
13 initiative, without being asked by any investigative
14 officer -- you found out that she was reviewing
15 conversations between your officers, of her own initiative,
16 to determine if there was misconduct, how would you handle
17 that?

18 A. It would be -- I think it would be misconduct on
19 the authority they have. That's not her position, in
20 private conversations.

21 But, you know, going back to, like, 911 calls or
22 things like that, I mean, there -- it's hard to just draw a
23 hard, fast line. If somebody called in saying, Hey, they
24 botched this call, you had a horrendous -- horrendous crime in
25 progress and nobody dispatched it, I think she would be

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1 asked to review that section and give us, you know, a copy
2 and her opinion as the supervisor.

3 But listening to private conversations, no, that
4 isn't her position.

5 Q. Would you say, if she had done that, that she was
6 acting outside of the regular course of conduct for the
7 director of communications?

8 A. Yes.

9 Q. Was the establishment of the practice of recording
10 phone calls meant to be a tool for the director of
11 communications? You used the phrase it's a tool for -- for
12 the division chiefs. You said it's a tool for them. Right?

13 A. Yes.

14 Q. My question to you is, when you established that
15 practice, did you intend for it to be a tool for the
16 director of communications to take it on -- on their own
17 initiative to listen to conversations internal to the South
18 Bend Police Department?

19 A. No, that's not what I intended.

20 MR. SULLIVAN: Thank you, Chief. I have no
21 further questions.

22 MR. PFEIFER: Chief, I have a couple of
23 questions.

24 CROSS EXAMINATION

25 BY MR. PFEIFER:

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1 Q. With respect to the statement that you have given,
2 a copy of which is in front of you -- and, I'm sorry, I'm
3 drawing a blank on the number.

4 MS. DUERRING: It was Exhibit Two.

5 Q. Exhibit Two. We --

6 MS. DUERRING: From yesterday.

7 Q. Okay. From yesterday. We're marking the exhibits
8 sequentially. And we have a different court reporter, so we
9 don't have the exhibits from yesterday.

10 But Exhibit Two, I'm just gonna represent -- your
11 statement is Exhibit Two. You had indicated earlier that
12 when you reviewed it prior to coming here today, you saw
13 something that was a change. Do you remember saying that?

14 A. Yes.

15 Q. Why don't you tell us what the change is since
16 nobody else asked.

17 A. Well, it may seem insignificant, but I like this
18 to be correct. And it's not that the court reporter made a
19 mistake. It was -- might have something to do with my age.
20 I don't know. But I said 2001 I became police chief,
21 instead of 2002.

22 MS. DUERRING: I actually noticed that but I
23 thought --

24 THE DEPONENT: It's like birthdays. They
25 just keep coming. You know, you can't keep track,

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1 I guess.

2 Q. So, the change is not a smoking gun in terms of
3 your testimony?

4 A. No.

5 Q. Okay. Basically, you -- the 2001 in the
6 statement, in terms of when you were chief, should be 2002?

7 A. Correct.

8 Q. Any other changes that you felt like you needed to
9 make with respect to Exhibit Two?

10 A. No.

11 Q. Okay. When you started this practice of recording
12 additional lines, if I understand what you said, the
13 practice kind of started by Gene Kyle asking to have his
14 phone line recorded. Correct?

15 A. Yes.

16 Q. Now, at the time, what was Gene Kyle's position?

17 A. He was the division chief for the detective
18 bureau.

19 Q. Okay. So, the recording of his line was at his
20 request?

21 A. Yes.

22 Q. And authorized by you?

23 A. Yes.

24 Q. If Gene Kyle had never requested his line be
25 recorded, would you as the chief of police have recorded his

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1 phone line?
 2 A. No.
 3 Q. Why not?
 4 A. It's his -- it's his office.
 5 Q. As the chief of police, do you believe that
 6 officers that had individual phone lines assigned to them
 7 had an expectation of privacy in terms of the use of those
 8 lines?
 9 MR. DIXON: Objection. Calls for speculation
 10 as to what other officers believed.
 11 Q. You can answer.
 12 A. No, I wouldn't -- I wouldn't tape that line,
 13 because they -- they make personal phone calls and, you
 14 know, it's their own phone.
 15 Q. From your perspective as the chief of police, did
 16 you believe that officers who were using their own phone
 17 making private phone calls had an expectation of privacy
 18 that their phone line would not be recorded unless they knew
 19 it was being recorded?
 20 A. Yes, it's -- it's my understanding that for a line
 21 like that, that one person has to have -- give permission to
 22 have the line taped. Has to be with their knowledge.
 23 Q. You indicated that when you were the chief of
 24 police, any of the individual lines that were recorded, you
 25 yourself never listened to those. Correct?

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1 A. Correct.
 2 Q. And I believe we've established, but I want to
 3 make sure. Would Karen Depaepe have had the authority on
 4 her own to listen to any of those recordings?
 5 A. No.
 6 And you're talking about the division chief's
 7 phones --
 8 Q. Yes.
 9 A. -- not 911?
 10 Yes, she didn't have permission to do that.
 11 Q. Okay. When Gene Kyle was no longer the division
 12 chief of the investigative -- investigation division or the
 13 detective bureau as we know it, who took his place?
 14 A. Rick Bishop.
 15 Q. When Rick Bishop took Gene Kyle's place, what, if
 16 any, discussion did you have with him about the phone line
 17 that Gene Kyle had been using in terms of it being recorded?
 18 A. I talked to Rick. I didn't know -- sometimes
 19 people keep their old number when they transfer. I asked
 20 him if he was gonna keep the old number or the -- you know,
 21 take Chief Kyle's number. He said he had to have new
 22 business cards made anyway, so he would just, you know, keep
 23 the existing number.
 24 And that -- I said, "Well, I want to tell you that
 25 that line is taped. It's up to you if you want to continue

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1 to have it taped."
 2 He said, "That's fine. I'll still help out with
 3 some internal affairs cases, you know, for any sensitive
 4 cases." He agreed to help do that. And he's -- you know,
 5 he said, "I use my cell phone for my personal calls."
 6 Q. So, whenever Rick Bishop took Gene Kyle's
 7 position, you advised him of the fact that that phone line
 8 was being recorded. Correct?
 9 A. Yes.
 10 Q. Would you have ever as the chief of police allowed
 11 Rick Bishop to take that position with the phone being
 12 recorded and not tell him?
 13 A. No. No.
 14 Q. Why not?
 15 A. Well, again, it's -- it's his own personal phone.
 16 Not personal phone, but it's his phone in his office that is
 17 just for him. It's not like the general phones coming into
 18 the police station. So, no, I wouldn't tape it without his
 19 knowledge.
 20 Q. Going back to Karen Depaepe. If I understand, the
 21 only way she would have been authorized to listen to a tape
 22 is if she was specifically asked by an officer to do so. Is
 23 that fair? By certain officers to do so.
 24 A. Well, again, I think we have to break this down in
 25 between 911 tapes and the tapes that we're talking about are

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1 internal affairs tapes.
 2 Q. Fair enough.
 3 A. Because on a 911 tape, things can happen, you
 4 know, that -- "What did that person say? We didn't hear
 5 it." I mean, she may -- she's authorized to get in there
 6 and play it back. I think the radio operators, some of
 7 them, I mean, had cassette recorders that they would tape
 8 calls right then at that time just for that purpose.
 9 So, I can't say one hundred percent she never had
 10 the ability -- or the right to get in there and listen.
 11 But when it came to internal affairs tapes and
 12 those individuals' offices, including my office, that she
 13 didn't have the authorization to get in there without a
 14 request.
 15 Q. Okay. If Karen Depaepe was ordered by the chief
 16 of police to listen to tapes and make recordings or
 17 cassettes of the tapes that she listened to, would she be
 18 obligated, from your perspective as the chief of police, to
 19 follow that order?
 20 A. Yes.
 21 Q. Going back to the recording of Gene Kyle's line.
 22 A. Yes.
 23 Q. If Gene Kyle wanted Karen Depaepe to retrieve a
 24 phone conversation that he had that had been recorded, would
 25 he have the right to go and ask her to do that?

1 A. Yes. It's his phone.
 2 **Q. Would anyone else, short of a criminal**
 3 **investigation being undertaken, as to Gene Kyle?**
 4 A. Well, I think as -- as chief of police, if I asked
 5 for a copy of it, she would provide it, simply because I'm
 6 a -- I was, you know, superior. But that never happened. I
 7 mean, I never asked for those.
 8 **Q. But short of the chief of police, no one else**
 9 **would have been -- from your perspective at -- when you were**
 10 **the chief, no one else would have been authorized to go and**
 11 **request a copy of a recorded conversation on Gene Kyle's**
 12 **line other than you and Gene Kyle?**
 13 A. Correct.
 14 **Q. If while you were the chief of police it was**
 15 **learned that a phone line of an individual was being**
 16 **recorded --**
 17 A. Uh-huh.
 18 **Q. -- and that individual did not know that the phone**
 19 **line was being recorded, once the individual realized that**
 20 **his or her phone line was being recorded, would that person**
 21 **have the ability and the right to have the recordings of his**
 22 **or her phone line stopped?**
 23 MR. DIXON: Objection. Compound.
 24 **Q. You can answer.**
 25 A. I would think so. I think it would -- you would

1 have a duty to report it to them, tell them, "However this
 2 happened, we're making you aware of it," and, you know, deal
 3 with it that way.
 4 **Q. And if -- I guess let's stop beating around the**
 5 **bush and put a name. If in August of 2011, Brian Young, who**
 6 **was the captain of the detective bureau, investigative**
 7 **division at that time, learned for the very first time that**
 8 **his phone line was being recorded without his knowledge and**
 9 **he requested that the recording of that phone line stop,**
 10 **would he have the right to make that request?**
 11 MR. DIXON: Objection. Compound sentence and
 12 asked and answered.
 13 A. If I was the chief, I would terminate it
 14 immediately.
 15 **Q. Why is that?**
 16 A. He has a right to privacy on his phone.
 17 **Q. And if his phone line had been recorded without**
 18 **his knowledge and he requested that the recordings of his**
 19 **phone line that had taken place without his knowledge be**
 20 **destroyed, would he have the right to do that?**
 21 A. Again, I don't know about that. I would probably
 22 defer to the city attorney to find out. I don't know how
 23 public records -- I mean, I don't know. I don't know.
 24 **Q. Okay.**
 25 A. I can't give you an honest answer on that one.

1 **Q. Fair enough.**
 2 **If -- Continuing with my illustration. If Brian**
 3 **Young, having learned that his phone line was being recorded**
 4 **without his knowledge, requested that the recording stop,**
 5 **would either Karen Depaepe or Barb Halaman have the right to**
 6 **refuse his request?**
 7 A. If -- if I was the chief, no, they wouldn't. I
 8 would -- I would terminate it immediately.
 9 **Q. With respect to Exhibit Two, rather than me sit**
 10 **here and ask you all the questions that were asked in**
 11 **Exhibit Two, if you were asked all those questions that are**
 12 **in Exhibit Two again on the record, would your answers that**
 13 **you gave at the time you were sworn in be the same now?**
 14 A. Yes, they would, with the exception of that 2001.
 15 MR. PFEIFER: Okay. I don't have anything
 16 else.
 17 MS. DUERRING: A slight break, if we could.
 18 (Brief recess taken.)
 19 REDIRECT EXAMINATION
 20 BY MS. DUERRING:
 21 **Q. All right. Chief, directing your attention to**
 22 **what I believe was marked as Exhibit Six today, the position**
 23 **description.**
 24 A. Yes.
 25 **Q. Am I right about that exhibit number?**

1 **I'd like you to direct your attention to the very**
 2 **bottom paragraph. If you could just review that for a**
 3 **second and let me know when you're done.**
 4 A. On the first page?
 5 **Q. On the first page. Thank you. Yes.**
 6 A. "Manages and maintains all physical resources
 7 housed and used within the communications center to ensure
 8 that all subordinates are properly equipped and equipment
 9 failures are properly identified, repaired, and restored to
 10 full operations."
 11 **Q. Okay. Having reviewed that paragraph, if your**
 12 **communications director was listening to phone calls in the**
 13 **scope of trying to determine whether the equipment was**
 14 **functioning properly, would that be within the scope of that**
 15 **individual's duties?**
 16 A. I guess if there was a problem with it, yes.
 17 **Q. Okay. Say, for example, if there had been a**
 18 **breakdown in hard drives and equipment that was maintained**
 19 **on those hard drives and an effort was being made to**
 20 **determine whether or not that information was being properly**
 21 **transferred. Would that be in the scope of the director of**
 22 **communications' responsibility as spelled out by this**
 23 **position description?**
 24 A. Yes.
 25 **Q. Okay. Now, during the course of your tenure as**

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1 chief, were there ever any independent Indiana State Police
2 investigations that would request or that requested
3 recordings that were made?

4 A. I can't specifically say so. But if they -- if
5 they had, we would certainly provide them.

6 Q. Okay. So, if there was an ISP investigation and
7 they were seeking recordings of phone conversations, would
8 it be within the scope of the director of communications'
9 responsibility to locate those recordings to provide to the
10 ISP?

11 A. Yes.

12 Q. Would you agree, if you know, that that may
13 consist of listening to phone conversations -- several phone
14 conversations in order to identify the specific
15 conversations that were requested?

16 A. Ask that again.

17 Q. I certainly will.

18 Say they're looking for a specific conversation.

19 A. Yes.

20 Q. And I understand that you don't necessarily know
21 the logistics of how these recordings are maintained. Is
22 that a fair statement?

23 A. Yes.

24 Q. Okay. If it was necessary to listen to multiple
25 conversations in order to identify the specific conversation

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1 that was requested, would that be within the scope of the
2 duties of the communication director?

3 MR. SULLIVAN: Objection. Vague as to
4 "necessary."

5 You can answer.

6 Q. You can answer.

7 A. I think that typically the investigator would be
8 there with her as she listened to those conversations under
9 their direction. But, yes, she would listen to 'em to
10 identify that particular location.

11 Q. Okay. And presence of the investigator, whether
12 they're there or not, would you say that that's outside the
13 scope of her duties if a specific request had been made?

14 MR. SULLIVAN: Objection. Vague as to who
15 would request.

16 You can answer.

17 A. I'm just trying to think through the
18 circumstances, and I would say yes.

19 Q. It would be outside of the scope of her duties?

20 A. No, it would be --

21 Q. Within the scope?

22 A. -- within her duties, yes.

23 Q. Thank you.

24 I can be more specific. Let's say that the city
25 attorney's office requested Karen to listen to multiple

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1 conversations in order to identify specific requests for
2 conversations that were made as part of a FOIA request.
3 Would you construe that as being outside of the scope of her
4 duties and responsibilities?

5 A. No.

6 Q. Thank you.

7 If I understood the progression correctly, Kyle's
8 line was then assumed by Bishop.

9 A. Yes.

10 Q. Is that correct?

11 And then who replaced Bishop?

12 A. Steve Richmond replaced Bishop. But that was
13 after I had retired.

14 Q. I understand.

15 To your knowledge, did the line associated with
16 that position continue from Kyle to Bishop to Richmond?

17 MR. PFEIFER: Which position?

18 MS. DUERRING: The uniform chief.

19 Or the investigative chief. I'm sorry.

20 MR. SULLIVAN: Objection. Lack of
21 foundation.

22 A. It wasn't really assigned to the position. It was
23 assigned to the person in that position. So, when Bishop
24 left, I mean, I can't -- I was gone. But I would -- I would
25 think it would be -- if it was going to continue for Steve

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1 Richmond, that he would be advised.

2 Q. Now, I understood from your previous testimony
3 that you were the one that actually sat Bishop down and
4 explained to him that the line was recorded?

5 A. Yes.

6 Q. Did you ever communicate to Karen that you were
7 having these specific conversations with the officer to
8 advise them?

9 A. No.

10 Q. Okay.

11 A. No. I never told her about Bishop. I told her
12 when we originally set those up that those officers -- you
13 know, it was with their permission and knowledge.

14 Q. Right. But at the time of transition from one
15 individual to the next, did you sit Karen down and say,
16 We're doing this with Bishop's okay?

17 A. No. No, I didn't.

18 Q. Did you ever communicate to Chief Boykins what the
19 policy had been with respect to these recorded lines?

20 MR. SULLIVAN: Objection to the phrase
21 "policy."

22 Go ahead.

23 A. When Jim Hassag was retiring -- and I think it was
24 sometime in 2005. He hadn't left yet. And I would have
25 conversations with Darryl and sometimes with Jim there as

11 (Pages 41 to 44)

1 just gonna use the term "on line." When Jim Hassag's
 2 line -- and you as the uniform division chief, as I
 3 understand it -- let me step back.
 4 As I understand it, the detective bureau chief
 5 line, the uniform division chief line, and your line as the
 6 chief of police line, the decision to record those lines
 7 occurred at about the same time?
 8 A. Yes.
 9 Q. And so if Jim Hassag a month after that decided he
 10 was gonna resign and go take a job somewhere else, is it
 11 your testimony that that line would not have been recorded
 12 any longer?
 13 A. Well, whoever followed him, I would give them the
 14 option. They would be --
 15 Q. But I thought that you testified --
 16 MR. PFEIFER: Wait a minute. Let him finish
 17 answering.
 18 MR. DIXON: Oh, I'm sorry. I thought you did
 19 answer.
 20 A. I would explain to 'em and give them the option of
 21 whether they wanted it to or not. It was their tool on --
 22 you know, to have the line taped.
 23 Q. I thought that you testified earlier that
 24 everything around these decisions to tape these three lines
 25 was -- was business-related for the department, that there

1 was calls coming in, that there were things that needed to
 2 be -- you needed backup of stuff because people weren't
 3 being -- there were allegations that police officers weren't
 4 being responsive, there were allegations that calls weren't
 5 being responded to, complaints weren't being responded to,
 6 and that as a department, you needed to have these lines --
 7 MR. PFEIFER: Object- --
 8 Q. -- recorded.
 9 MR. PFEIFER: Object to --
 10 Q. That's what I thought your testimony was. Is that
 11 what it was?
 12 MR. PFEIFER: Object to the form of the
 13 question. Now it's compound.
 14 Q. If you understand the question, you can answer it.
 15 MR. PFEIFER: Same objection.
 16 Q. Is that what your testimony was?
 17 MR. PFEIFER: Same objection.
 18 A. Yes. Something along that line. It was -- it was
 19 a tool for them to be able to prove that they were reacting
 20 appropriately. It was -- it was kind of a backup for that
 21 person. But as -- in their position as a police officer.
 22 Q. But it was certainly more significant that it was
 23 the chief as opposed to a patrolman, right, who said "I want
 24 backup on my line"?
 25 MR. PFEIFER: Objection. That's

1 argumentative.
 2 A. I'm not sure I understand.
 3 Q. Well, let me -- let me create a little bit of
 4 foundation for where I'm going. You understand there's a
 5 limited number of lines that could be recorded. Right?
 6 A. Yes.
 7 Q. And I think we know -- although I think it's been
 8 kind of open question -- we know that there was never more
 9 than 48 lines that could be recorded. So, I'm just gonna
 10 ask you if you understand that or if you have any
 11 disagreement with that.
 12 A. I don't have any reason to disagree. I thought it
 13 was something like 20, but I, you know, don't know for sure.
 14 Q. So, in this period of time where you're wanting to
 15 be more responsive to the public and you're wanting to have
 16 more lines taped because of these calls that are maybe not
 17 getting responded to or the allegations that are being made,
 18 what happens if there's 50 guys who say "I want my line
 19 recorded"? Don't you have a set of priorities that, well,
 20 these lines are more important to be recorded than these?
 21 A. I guess if there was a limited number of lines and
 22 you needed more lines taped than what you -- you would have
 23 to make a decision on which -- which priority was highest.
 24 But I don't ever see that happening.
 25 Q. Now, you talked a lot about this -- about

1 obtaining consent --
 2 A. Yes.
 3 Q. -- to get the lines -- to get the lines taped.
 4 And you also talked quite a bit about without the consent,
 5 the line would not be taped because the officer has a right
 6 of privacy?
 7 A. I mean, that's -- that's the way I feel.
 8 Q. But can you tell me where this right of privacy
 9 comes from.
 10 MR. SULLIVAN: Objection. Calls for a legal
 11 conclusion.
 12 A. It's their personal phone in their office. I
 13 think you have an expectation, if that's your phone, that
 14 nobody is listening in on it.
 15 Q. How 'bout your computer? Same expectation of
 16 privacy?
 17 A. No. Because I think there's public information
 18 laws that say any e-mail on that computer is public
 19 information.
 20 Q. How 'bout your car?
 21 A. Car --
 22 Q. Your squad car.
 23 A. Car is property of the department. There's no
 24 expectation of privacy in your car.
 25 Q. And this is what -- this is what I'm -- I'm not

1 talking about, you know, tell me what the Seventh Circuit
2 says about what a right of privacy is. I'm talking about
3 what you understand an expectation of privacy is.
4 A. And that's -- that's the way I understand it. I
5 mean, you know, your car is public property.
6 Q. But what I'm trying -- what I'm grappling with is
7 this notion that any police officer would have any
8 expectation of privacy in anything in a police department.
9 That's kind of where I'm going. That's not a question. I'm
10 just letting you know where I'm going with that.
11 There's nothing in your policies and procedures
12 that say a person -- a police officer's phone line is
13 private property.
14 MR. SULLIVAN: Objection. Argumentative.
15 Q. Right? Is there? I mean, you know --
16 A. Not that I know of.
17 Q. Well, you were on the department 30 years.
18 A. Thirty-four and a half.
19 Q. And at some point, you, as long -- with millions
20 of other guys, had the grueling task of having to go through
21 that dog-gone manual at least once. Right?
22 A. Yes.
23 Q. And you probably took on the task of trying to
24 revise it --
25 A. Yes, I did.

1 Q. -- at some point?
2 And so you, as much as anybody, would be familiar
3 with the standard operating procedures in the duty manual of
4 the South Bend Police Department?
5 A. Yes.
6 Q. There's nothing in the South Bend duty manual or
7 standard operating procedures of the South Bend Police
8 Department that says officers have a right of privacy in
9 their private phones -- or in the phones in their office.
10 Right?
11 A. Not that I can recall.
12 Q. The only policy that we know of that deals with
13 the issue of expectations of privacy with police officers is
14 that Exhibit Four.
15 MR. SULLIVAN: Objection. Mischaracterizes.
16 Q. Right?
17 A. Exhibit Four?
18 MR. PFEIFER: Objection. Argumentative.
19 Q. Well, I'm asking you, if you -- Look at Exhibit
20 Four. Do you have that in front of you?
21 A. No.
22 Q. You probably hadn't looked at all this deposition,
23 have you? So, take your time to look at it.
24 A. I mean, I hadn't really -- this was made after I
25 left. This was different than the policy when I was there.

1 Q. Okay. Was there a policy that -- when you were
2 there, that talked about expectations of -- officers'
3 expectations of privacy or the lack of an expectation of
4 privacy?
5 MR. PFEIFER: I'm gonna object. That's a
6 compound question.
7 A. Do we have the policy that was in effect when I
8 was there? This is a new document.
9 Q. Okay. I don't know. I'm just asking you if you
10 remember. It also has to come from your memory.
11 A. I don't remember anything about expectation of
12 privacy being specifically stated in there.
13 Q. Do you remember ever seeing a document that said
14 police officers have a right of privacy in the phone -- in
15 their phones in their offices at the police department?
16 A. Not that I can recall. But, I mean, that's a big
17 duty manual and, I mean, I'd like to read it first before I
18 make any -- give you an answer.
19 Q. We don't have that kind of time.
20 A. I am a slow reader. Is that what you're saying?
21 Q. No. No. I'm saying the duty manual's this big.
22 Well, we were provided a sworn statement from
23 Brent Hemmerline. And in that statement, Brent Hemmerline
24 indicated that he did not know that his line was being
25 recorded or had been recorded. Assuming that's what Brent

1 Hemmerline testified to or gave a sworn statement to, I'm --
2 what I'm trying to get -- I understand that would have been
3 during Chief Bennett's tenure prior to you becoming chief.
4 Right?
5 A. Yes. He retired before I was chief.
6 Q. Okay. So, I'm just giving you that information as
7 my way of background for these questions.
8 A. Sure.
9 Q. When Chief Bennett retired, did the two of you
10 talk about -- before he retired and you transitioned into
11 the position of chief, did the two of you have any
12 discussions about the policies related to recording phone
13 lines?
14 MR. PFEIFER: Object to the form of the
15 question. Move to strike your narrative.
16 MR. DIXON: Yeah, we can strike the
17 narrative. I agree to that.
18 Q. So, back to the question. At the time when you
19 transitioned into the chief of police and Chief Bennett was
20 retiring, I'm sure that you guys met and talked from time to
21 time. Right?
22 A. There wasn't a whole lot of transition, and I
23 don't believe we ever talked about recordings.
24 Q. About the policies?
25 A. No.

1 Q. Okay. So, in terms of putting these new lines on
2 the recording system, Kyle's line, your line, Hassag's line,
3 those were decisions you made based on what you thought the
4 policy was or should be, what you wanted the policy to be?
5 A. I can't really say policy. It was the practice
6 that I, you know, put forth.
7 Q. But don't you think that right of privacy, that
8 expectation of privacy, is an important thing to protect?
9 A. Yes.
10 Q. And don't you think there are ways to protect that
11 expectation of privacy that were not implemented by you when
12 you were recording these lines?
13 MR. PFEIFER: Objection to the form of the
14 question. Argumentative unless you want to give a
15 specific example of how it is you claim as the
16 chief of police he didn't protect an officer's
17 right of privacy.
18 MR. DIXON: Yeah, that was gonna be my next
19 question. But I'll just rephrase the question.
20 Q. Did you have a document that these guys signed
21 that said "I understand that my phone line is being
22 recorded"?
23 A. No.
24 Q. Did you put anything on the phones that said "I
25 understand that this phone is being recorded" -- "that this

1 line is being recorded"?
2 A. No.
3 Q. Did you implement a policy that said you can't
4 move your phone from one office to another, you can't
5 disable the phone and move it from one office to another?
6 A. No.
7 Q. Did you have a policy that said there are -- or
8 did you have something in writing that designated that "This
9 particular office, the line that's coming in here is going
10 to be a recorded line for anybody who comes in and uses
11 this"?
12 A. No, I didn't.
13 Q. And was -- when -- when Eugene Kyle was a
14 detective bureau chief, was it within the realm of
15 possibility that somebody else would have used his phone
16 line besides him?
17 MR. PFEIFER: Objection. That's
18 argumentative and speculative.
19 Q. I'm asking you to speculate as to whether or not
20 it was within the realm of possibility that somebody else
21 would have been able to use that line.
22 MR. PFEIFER: I'm gonna object as to the
23 speculative nature.
24 Q. You can answer.
25 MR. PFEIFER: Witnesses aren't supposed to

1 speculate.
2 Q. You can answer it.
3 A. I -- Possible.
4 Q. Yeah. He didn't have a -- like a lockdown office
5 where nobody could go in there, did he?
6 A. Well, yeah, he had a locked office, but -- you
7 know. But somebody --
8 Q. Did you guys have a policy in place that any time
9 you weren't in your office it was locked up and nobody else
10 could --
11 A. No.
12 Q. -- get in there?
13 A. No.
14 Q. And when you retired as chief, you didn't leave
15 any -- anything behind in writing that indicated to Chief
16 Boykins "These are the lines that are being recorded. It's
17 your decision whether or not you want to continue recording
18 these lines." Right?
19 A. I -- no, not when I left. The only conversation I
20 ever had with Darryl was when he assumed that position, for
21 his information, and he could make a decision on his line
22 and to know that there were others that were taped.
23 Q. I've spoken with many police officers who thought
24 that all of the lines in the South Bend Police Department
25 have been recorded from a long time ago. Have you spoken

1 with any South Bend police officers who shared that?
2 MR. PFEIFER: Object to the form of the --
3 MS. DeROSE: Object to the form of the
4 question.
5 MR. PFEIFER: Object to the form of the
6 question. Move to strike the narrative.
7 Q. You can answer the question.
8 MR. SULLIVAN: Join the objection.
9 Q. You can answer the question.
10 A. Well, I'll put it this way: Policemen are
11 suspicious people by nature, and certainly -- I mean, if I
12 talked on this phone, I'd wonder is it taped. Did they have
13 any specific knowledge or true belief? No, not that I know
14 of. But I certainly didn't discuss that with people, do you
15 think all the phones are taped. That was a question that
16 never came up.
17 Q. Why -- If the expectation of privacy is
18 important -- and I agree with you that it is -- why was
19 there never anything put out there when you were the chief
20 of police that said, for general information, these are the
21 lines that are taped?
22 A. I -- I -- the only thing I can speak of is we
23 wanted those individuals' lines that we added -- or that I
24 added -- not we -- I added -- was for those people's use,
25 and we just -- I just told Karen keep it confidential, they

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1 know about it. And we weren't out there to broadcast it or
 2 put on the news that anybody calling in to internal affairs
 3 would be taped.

4 **Q. I'm not talking about making a press release. I'm**
 5 **talking about letting police officers -- all the police**
 6 **officers on the department know which lines are recorded.**

7 MR. SULLIVAN: Objection. Argumentative.
 8 Asked and answered.

9 **Q. Well, I mean, that's what my -- that's what my**
 10 **question is. Is that -- is it the same answer with that**
 11 **question?**

12 A. Yeah. I mean, you know, I guess there's a lot of
 13 ways -- in looking back on things, could you have done
 14 things differently? Certainly. Did what we thought was
 15 best at the time, and, you know, that's pretty much it.

16 **Q. Well, I'm just trying to understand this**
 17 **expectation of privacy. And it's an important issue in this**
 18 **case. And I'm also trying to understand what procedures you**
 19 **implemented in order to presumably protect that expectation**
 20 **of privacy. I'm not trying to second-guess you. I'm just**
 21 **trying to understand how things went on back then.**

22 Did -- do you believe that a police officer had an
 23 expectation of privacy in their own -- just in the space of
 24 their own office?

25 MR. SULLIVAN: Objection. Vague. And it

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1 calls for a legal conclusion.

2 Go ahead.

3 A. I mean, you know, could you be a little more
 4 specific what -- like, searching their desk or those --
 5 those kinds of things? I mean -- or peeking in the window
 6 or -- you know, I'm not --

7 **Q. Just anything. If they -- if an officer goes into**
 8 **his private office and closes the door, does he have an**
 9 **expectation of privacy?**

10 MR. SULLIVAN: Objection. Vague. Calls for
 11 a legal conclusion.

12 Go ahead.

13 A. I don't know the legal conclusion. I would say
 14 out of just common courtesy, yes.

15 **Q. I've been informed that when you became chief of**
 16 **police you had your office searched for bugs. Is that**
 17 **correct?**

18 A. I think --

19 MR. PFEIFER: Objection. Relevance.

20 MR. SULLIVAN: Lack of foundation.

21 MR. PFEIFER: And outside the scope of what
 22 these depositions are intended to encompass.

23 MR. DIXON: No. It's right within the -- the
 24 whole issue is the expectation of privacy. If he
 25 didn't -- if the chief didn't have an expectation

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1 of privacy in his own office when he became the
 2 chief of police, that runs directly to the issue
 3 of whether or not a police officer has an
 4 expectation of privacy on the telephone line.
 5 That's the equipment of the city.

6 MR. PFEIFER: I made my objection.

7 **Q. So, did you have your office searched for bugs**
 8 **when you became the chief of police?**

9 A. I think all the chiefs did. It's kind of a
 10 common-type thing.

11 MR. DIXON: All right. Thank you. I don't
 12 have any other questions.

13 RECROSS EXAMINATION

14 BY MR. PALMER:

15 **Q. Tom, you -- you testified at great length your**
 16 **practices regarding what you would do when you either added**
 17 **or if a situation would come up where you were terminating a**
 18 **line that was being taped, that you would have an officer**
 19 **consent to it. You've testified as to your -- what your**
 20 **practices were?**

21 A. Yes.

22 **Q. Were those practices ever reduced to writing?**

23 A. No.

24 **Q. Were those practices ever passed on from a prior**
 25 **police chief to you?**

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1 A. No.

2 **Q. Were those practices ever passed on from you to**
 3 **Chief Boykins?**

4 A. No. Other than the conversation about, you know,
 5 it's your option.

6 **Q. You also testified as to director of**
 7 **communications having, within the scope of that job,**
 8 **listening to tapes in -- in respect to maintaining the**
 9 **system or if the state police requested or if there was a**
 10 **FOIAR -- FOIA request. If the director of communications**
 11 **was listening to the tapes within the scope of her**
 12 **employment and heard something that he or she believed was**
 13 **relating to illegal contact -- illegal conduct, would it be**
 14 **within the course and scope of her employment to inform**
 15 **someone higher up the chain of command?**

16 A. Yes.

17 **Q. The same question regarding unethical conduct.**
 18 **Would it be within her scope and course of employment to**
 19 **relay that to someone higher in the chain of command?**

20 A. Yes.

21 MR. PALMER: That's all the questions I have.

22 RECROSS EXAMINATION

23 BY MR. SULLIVAN:

24 **Q. Chief, appreciate your patience a little more. Do**
 25 **you recall the questions from -- I think it was Attorney**

16 (Pages 61 to 64)

1 in fact a policy and a procedure and a practice that you
2 followed?

3 A. I hope I'm answering this right, because people
4 working the front desk, they really don't give their
5 consent. It's part of their job duty and it's -- they're
6 made aware of it, but it's not consent.

7 Q. Bad question on my part. Let's focus -- let's
8 eliminate the 9-1-1 calls, let's eliminate the
9 communications office where for years those phone lines have
10 been recorded.

11 A. Yes.

12 Q. In terms of the lines that you added, that you
13 were now going to record, the -- your personal line, Gene
14 Kyle's line at his request, Jim Hassag's line, internal
15 affairs, was it the procedure and the policy and the
16 practice not to record those lines if, in fact, the person
17 using that line did not consent to the recording?

18 MR. DIXON: Object to the form.

19 Q. You can answer.

20 A. The first three, they would have to give their
21 consent. The last one, internal affairs, that was kind of
22 with that job position. It was made with knowledge, not
23 necessarily consent.

24 Q. So, whoever took the internal affairs position
25 took it knowing that the phone lines were gonna be recorded?

1 A. Yes.

2 Q. So, there was knowledge on their part, but not
3 necessarily the consent?

4 A. Correct.

5 Q. Although consent could be implied by the mere
6 taking of the position?

7 A. Yes. And they had other phone lines for -- that
8 were not recorded.

9 MR. PFEIFER: Okay. Uncle.

10 THE DUERRING: Nothing for me.

11 MR. PFEIFER: I assume we want him to read
12 it -- we'd like for him to read and sign it?

13 MR. SULLIVAN: Yes.

14 MR. PFEIFER: Because unless we all consent,
15 he has to read and sign it, so . . .

16 THE REPORTER: Are all the orders on this
17 deposition the same as all the others?

18 MS. DUERRING: Yes.

19 MR. SULLIVAN: Yes.

20 MR. PFEIFER: Yes.

21 MR. PALMER: Yes.

22 MR. DIXON: Yes.

23 (Deposition concluded at 6:16 p.m. EST.)

24 ---o0o---

25

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF INDIANA
3 SOUTH BEND DIVISION
4 CITY OF SOUTH BEND,)
5 Plaintiff,)
6 vs.)
7 SOUTH BEND COMMON COUNCIL,) CAUSE NO.:
8 ET AL.,) 3:12-cv-475
9 Defendants.)
10 BRIAN YOUNG, SANDY YOUNG,)
11 TIMOTHY CORBETT, DAVID WELLS,)
12 and STEVE RICHMOND,) CAUSE NO.:
13 Plaintiffs,) 3:12-cv-532-JVB-CAN
14 vs.)
15 THE CITY OF SOUTH BEND, Acting)
16 Through its Police Department,)
17 DARRYL BOYKINS, Individually)
18 and in his Official Capacity as)
19 Chief of Police, KAREN DEPAEPE,)
20 and SCOTT DUERRING,)
21 Defendants.)

12 DEPONENT'S CERTIFICATE
13 I, THOMAS FAUTZ, do hereby certify that I have
14 read my deposition consisting of 70 pages, and that it is a
15 complete transcription of my deposition;
16 Any corrections to my deposition are reflected on
17 the attached errata sheet(s). There are _____ errata
18 sheet(s) attached;
19 Dated this _____ day of _____,
20 2013.

21 _____
22 THOMAS FAUTZ

23 Subscribed and sworn to before me this _____ day of
24 _____, 2013.

25 _____
Notary Public
County of Residence:

My commission expires: _____

1 STATE OF INDIANA)
2)SS:
3 COUNTY OF LAPORTE)
4

5 COURT REPORTER'S CERTIFICATE

6 I, Michelle A. Whitaker, RPR and duly authorized
7 to administer such oath, do hereby certify that on the 16th
8 day of April, 2013, at May, Oberfell, Lorber, 4100 Edison
9 Lakes Parkway, Mishawaka, Indiana, commencing at or about
10 the hour of 4:36 p.m., there appeared before me Thomas
11 Fautz, who was thereupon first duly sworn by me to testify
12 the truth, the whole truth and nothing but the truth during
13 the taking of his deposition;

14 I further certify that I reported said deposition
15 proceedings by the means of machine shorthand, and that I
16 have transcribed my original shorthand notes through the use
17 of computer-aided transcription into the typewritten form;
18 and that the foregoing and attached pages, or parts of
19 pages, numbered inclusively one through 70 comprise a true,
20 correct, complete and accurate transcript of said deposition
21 proceedings;

22 I further certify that present during the taking
23 of the deposition were the following attorneys: Edward A.
24 Sullivan, III; Aladean M. DeRose; Daniel Pfeifer; Robert J.
25 Palmer; Thomas M. Dixon, Marielena Duerring;

I further certify that I am not employed by, nor

Page 73

1 am I related to, any of the parties herein, nor their
2 attorneys; nor do I hold any guaranteed contracts with any
3 financially interested third parties or entities;
4 IN WITNESS WHEREOF, I have hereunto set my hand
5 and official seal this 28th day of April, 2013.

Michelle A. Whitaker
MICHELLE A. WHITAKER, RPR
ASSOCIATE REPORTER

—o0o—

14 THIS CERTIFICATE APPLIES ONLY TO THE ORIGINAL TRANSCRIPT
15 HEREOF AND DOES NOT APPLY TO ANY XEROX COPIES MADE OF THIS
16 TRANSCRIPT.